STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2018
v	No. 338295 Oakland Circuit Court
JAMES Y. STURDIVANT, Defendant-Appellant.	LC No. 1996-145767-FC

Before: MURPHY, P.J., and JANSEN and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c) (sexual penetration during the commission of another felony), one count of carjacking, MCL 750.529a, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment for both CSC-I convictions, 35 to 75 years' imprisonment for the carjacking conviction, and two years' imprisonment for each felony-firearm conviction. This is defendant's fourth appeal in this matter. The instant appeal follows the entry of an amended judgment of sentence, which defendant appeals as of right. Defendant challenges the proportionality of his sentences and requests a remand for resentencing. We find the issue of proportionality is based upon the law of the case doctrine, vacate defendant's amended judgment of sentence in part, and remand to the trial court.

Defendant was originally convicted by a jury and sentenced by Judge Steven Andrews in 1996. Defendant filed an appeal that same year, contending, among other things, that his sentences "violate[d] the principle of proportionality and [constituted] an abuse of discretion." *People v Sturdivant*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 1998 (Docket No. 199580), pp 1-2. This Court disagreed, and held that defendant's sentences were proportionate because of "aggravating factors not taken into account by the guidelines," and because defendant's minimum sentencing guidelines score was "in excess of the highest possible grid." *Sturdivant*, unpub op at 3. Defendant then filed two subsequent applications for leave to appeal, but both were dismissed for procedural and jurisdictional reasons. *People v Sturdivant*, unpublished order of the Court of Appeals entered April 30, 2002 (Docket No. 238593); *People v Sturdivant*, unpublished order of the Court of Appeals, entered March 13, 2013 (Docket No. 314042).

Sometime in late 2016, the presiding trial judge, now Judge Leo Bowman, received a letter from the Michigan Department of Corrections (MDOC) related to defendant's judgment of sentence. On January 24, 2017, Judge Bowman held a hearing at which he explained that the MDOC letter indicated that defendant's judgment of sentence did not specify how defendant's carjacking sentence would be served in relation to his felony-firearm sentence, despite a statutory mandate that the sentences be served consecutively to one another. Judge Bowman then noted that it was clear from the original sentencing transcript that Judge Andrews intended the sentences to be served consecutively and noted that the language of the judgment of sentence arguably reflected the same, but nevertheless amended defendant's judgment of sentence to explicitly include the language: "COUNT 3 IS CONSECUTIVE TO COUNT 4; IN ALL OTHER ASPECTS, THE SENTENCE REMAINS THE SAME."

Defendant now appeals the amended judgment of sentence, contending that he was resentenced by Judge Bowman and that the sentences violate the principle of proportionality. The prosecution contends that the trial court merely corrected a clerical error pursuant to MCR 6.435, and that, regardless, with this Court having already determined defendant's sentences were proportional in a prior appeal, the law of the case doctrine bars defendant's proportionality argument. We agree with the prosecution that the law of the case doctrine disposes of defendant's proportionality argument, but nonetheless partially vacate the amended judgment of sentence because the trial court made a substantive alteration to defendant's judgment of sentence, and lacked the authority to do so sua sponte.

"This Court reviews de novo questions of law, including the interpretation and application of our court rules." *People v Howell*, 300 Mich App 638, 644; 834 NW2d 923 (2013), citing *People v Cole*, 491 Mich 325, 300; 817 NW2d 497 (2012). "We interpret court rules using the same principles that govern the interpretation of statutes." *Howell*, 300 Mich App at 644 (quotation marks and citations omitted).

MCR 6.435 provides authority for trial courts to correct clerical mistakes in criminal matters on its own initiative:

> (A) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.

Based upon the rule, "a court may correct a clerical mistake on its own initiative at any time, including after a judgment [is] entered." *People v Comer*, 500 Mich 278, 293; 901 NW2d 553 (2017). We agree with the prosecution that the trial court's clarification as to whether defendant's carjacking sentence would run concurrent with or consecutive to defendant's felony-firearm sentence amounted to the correction of a clerical error.

Noting that staff comments to Michigan Court Rules are not binding authority, they are, nevertheless, illustrative. *People v Williams*, 483 Mich 226, 237-239; 769 NW2d 605 (2009); *People v Peck*, 481 Mich 863, 864; 748 NW2d 235 (2008). The comment for MCR 6.435 expounds upon the difference between clerical and substantive mistakes:

> Subrule (A) repeats verbatim the civil clerical mistakes rule, MCR 2.612(A)(1). Under this rule the court may correct an inadvertent error or omission in the record, or in an order or judgment. The correction can be made by the court at any time subject to the limitation in subrule (D) pertaining to cases on appeal. The court, in its discretion, may give the parties prior notice.
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> Subrule (B) is new and pertains to mistakes relating not to the accuracy of the record, but rather, to the correctness of the conclusions and decisions reflected in the record. Substantive mistake refers to a conclusion or decision that is erroneous because it was based on a mistaken belief in the facts or the applicable law. Unlike clerical mistakes under subrule (A), the court's ability to correct substantive mistakes pursuant to subrule (B) ends with the entry of the judgment. See 6.427. This limitation does not, however, prohibit a party aggrieved by a substantive mistake from obtaining relief by using available postconviction procedures.
>
> The following examples illustrate the distinction between the two foregoing provisions. A prison sentence entered on a judgment that is erroneous because the judge misspoke or the clerk made a typing error is correctable under subrule (A). A prison sentence entered on a judgment that is erroneous because the judge relied on mistaken facts (for example, confused codefendants) or made a mistake of law (for example, unintentionally imposed a sentence in violation of the Tanner rule) is a substantive mistake and is correctable by the judge under subrule (B) until the judge signs the judgment, but not afterwards. In the latter event, however, the defendant may obtain relief by filing a postconviction motion. See 6.429. [MCR 6.435, 1989 Staff Comment.]

It is clear in this case that the sentencing judge did not rely on mistaken facts nor a mistake of law regarding defendant's carjacking sentence. The trial court explicitly noted at sentencing that, pursuant to statute, defendant's carjacking sentence was to run consecutively with the corresponding felony-firearm sentence:

> Under the laws of this state, I'm required to also state on the record that the felony[-]firearm charges are to run concurrent. The carjacking and the criminal sexual conduct charges are also to run concurrent. However, they are to run consecutive to the felony[-]firearm charges.

The subsequently entered judgment of sentence, however, lacked the same particularity:

> CSC CHARGES ARE CONSECUTIVE TO FELONY[-]FIREARM CHARGES/FELONY[-]FIREARM CHARGES ARE CONCURRENT TO

EACH OTHER/CSC & CARJACKING ARE CONCURRENT TO EACH OTHER.[1]

After holding a hearing, which is not procedurally required of a trial court aiming to correct a clerical error, the trial court amended the judgment of sentence to more explicitly mirror the language of the sentencing trial judge.

The circumstances in this case are similar to those found in *Howell*, 300 Mich App at 646-647, wherein this Court found that a trial court merely corrected a clerical error after amending a judgment of sentence which failed to include a statutorily mandated provision that the defendant's sentences were to run consecutively with a sentence for which he was already on parole. This Court found that the trial court's original error constituted an "omission," and was not "based on the trial court's mistake of facts or law." *Howell*, 300 Mich App at 647, citing MCR 6.435, 1989 Staff Comment. This Court found the same despite the fact that "the trial court failed to specify whether [the defendant's] sentences were concurrent with or consecutive to his parole sentence at *both the sentencing hearing* and in its first judgments of sentence." *Howell*, 300 Mich App at 647 (emphasis added). It was enough that the trial court merely "recognized on the record at the resentencing hearing that [the defendant] was on parole." *Id*.

In this case, unlike *Howell*, the sentencing judge correctly identified that defendant's carjacking sentence was to run consecutively to defendant's felony-firearm sentence at sentencing, but simply omitted the same in the judgment of sentence. Accordingly, we agree with the prosecution that the trial court's further clarification regarding defendant's carjacking sentence amounted to the correction of a clerical error.

In addition to correcting a clerical error, however, the trial court added another provision to defendant's amended judgment of sentence that amounted to a substantive alteration, and thus, was not a change that the trial court was permitted to make sua sponte. Quite recently, in *Comer*, 500 Mich at 286, the Michigan Supreme Court addressed whether (1) omission of a statutory requirement in a defendant's judgment of sentence rendered the sentence invalid, and (2) whether the trial court was authorized to amend the sentence sua sponte based upon the same.

In *Comer*, the defendant pleaded guilty to CSC-I and second-degree home invasion. *Id*. at 283. The defendant received concurrent sentences of 51 months to 18 years' imprisonment for the CSC-I conviction, and 51 months to 15 years for the home invasion conviction. *Id*. Although MCL 750.520n(1) compelled the sentencing court to sentence the defendant to lifetime

[1] One might argue that the language on the judgment of sentence was not in error at all. The order states that the CSC sentences were to run consecutive to the felony-firearm sentences and that the carjacking sentence was to run concurrently with the CSC sentences, thus implying that the carjacking sentence was intended to run consecutive to the felony-firearm sentences *along with* the CSC sentences. On the other hand, the language is not explicit with regard to the carjacking sentence, and the prosecution more or less concedes the same by arguing that the judgment of sentence did, in fact, contain a clerical error.

electronic monitoring, the line including the provision on the defendant's judgment of sentence "was not checked, and the trial court did not otherwise indicate that [the] defendant was subject to lifetime electronic monitoring." *Id*. at 284. After MDOC notified the trial court by letter that the "defendant's sentence should have included lifetime electronic monitoring," and after the defendant denied an offer to withdraw his guilty plea based upon his attorney having failed to advise him of the same, "the trial court signed a new judgment of sentence retaining the term of incarceration previously imposed and adding: 'Lifetime GPS upon release from prison.' " *Id*. at 284-285.

The defendant appealed to this Court, which held that the trial court's failure to include the statutory mandate that the defendant would be subject to lifetime electronic monitoring rendered the defendant's original judgement of sentence invalid, and because the defendant's sentence was invalid, the trial court was permitted to correct the sentence sua sponte pursuant to *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997), overruled by *Comer*, 500 Mich at 299. *Comer*, 500 Mich at 285-286. The defendant then appealed to the Michigan Supreme Court, and the Supreme Court overruled *Harris*, holding that "a party must move to correct an invalid sentence; a court cannot do so on its own accord after entry of the judgment." *Id*. at 299.

Comer left open the possibility that the mistake in that case—failure to include lifetime electronic monitoring in the judgment of sentence—might have been a clerical mistake had the original sentencing judge said something "about lifetime electronic monitoring at the initial sentencing." *Comer*, 500 Mich at 293. See also *People v Thompson*, 501 Mich 873, 873-874; 901 NW2d 859 (2017) (explaining *Comer* as having held that failure to impose lifetime electronic monitoring where the same is statutorily mandated was a substantive rather than clerical error). The same circumstance exists in this case: the trial court did not address electronic monitoring at sentencing or on the original judgment of sentence, but subsequently added "DEFENDANT MUST SERVE LIFETIME TETHER UPON RELEASE FROM PRISON" to the amended judgment of sentence sua sponte.[2]

Although the trial court was permitted to amend defendant's judgment of sentence to add language concerning defendant's carjacking sentence running consecutively to his felony-firearm sentence, the trial court exceeded its authority when it added the provision concerning lifetime electronic monitoring, and we therefore vacate that portion of defendant's amended judgment of sentence.

[2] Notably, and unlike *Comer* and *Thompson*, at the time of defendant's sentencing, the provision mandating lifetime electronic monitoring had yet to be codified; the provision was not added until 2006. MCL 750.520b, as amended by 2006 PA 169. See also *Comer*, 500 Mich at 289-290 (recognizing that MCL 750.520b(2)(d) imputes mandatory electronic monitoring for all CSC-I convictions not involving a sentence of life without parole). Accordingly, whether defendant's sentence was invalid in the first place is questionable. Notwithstanding, this Court need not reach the issue because the trial court was outside its authority to add the electronic monitoring provision regardless of the validity of the underlying sentence. See *Comer*, 500 Mich at 299.

Next, as to the issue of proportionality, we agree with the prosecution that the issue is barred by the law of the case doctrine.

The law of the case "doctrine provides that an appellate court's decision regarding a particular issue is binding on courts of equal or subordinate jurisdiction during subsequent proceedings in the same case." *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543, 547 (1994), citing *Johnson v White*, 430 Mich 47, 52-53; 420 NW2d 87 (1988), and *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 546; 481 NW2d 762 (1992). "Under the law of the case doctrine, an appellate court's determination of law will not be differently decided on a subsequent appeal in the same case if the facts remain materially the same." *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996), citing *People v Whisenant*, 384 Mich 693; 187 NW2d 229 (1971). "The law of the case doctrine is a general rule that applies only if the facts remain substantially or materially the same." *People v Phillips*, 227 Mich App 28, 31-31; 575 NW2d 784 (1997), citing *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995), and *Johnson v White*, 430 Mich 47, 52; 420 NW2d 87 (1988). "Particularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice." *Phillips*, 227 Mich App at 33, citing *Herrera*, 204 Mich App at 340-341.

Defendant fails to suggest on appeal that the facts are not substantially or materially the same today as when this Court held that defendant's sentences were proportionate in 1998. See *Sturdivant*, unpub op at 3. Moreover, having vacated only the substantive alteration to defendant's judgment of sentence—an alteration that defendant himself fails to address on appeal—defendant's sentence is exactly the same in substance—and arguably in form—as it was in 1998. That is, not only did Judge Andrews explicitly articulate at sentencing that defendant's carjacking sentence was to run consecutively to the felony-firearm sentence, but we agree with Judge Bowman that the original judgment of sentence, plainly read, tends to indicate the same. Given that defendant's sentences are the same as they were in 1998, and given that the facts remain substantially and materially the same—if not exactly the same—defendant's sentences remain proportionate pursuant to the law of the case doctrine.

Affirmed in part, vacated in part, and remanded to the trial court for entry of an amended judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Amy Ronayne Krause